

1. 1419685 (Migration) [2015] AATA 3631 (12 November 2015)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Surya Prasad Pandey

CASE NUMBER: 1419685

DIBP REFERENCES: CLF2012/160108; CLF2014/135754

MEMBER: Rosa Gagliardi

DATE: 12 November 2015

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa:

- Public Interest Criterion 4020 for the purposes of cl.820.226 of Schedule 2 to the Regulations.

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3:37pm

Statement made on 12 November 2015 at

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 November 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 3 August 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.820.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because Public Interest Criteria 4020 had not been met.
8. The applicant appeared before the Tribunal on 20 August 2015 to give evidence and present arguments. The Tribunal also received oral evidence the applicant's sponsor, Mrs Amrita Aryal. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
9. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.820.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
12. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

13. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
14. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. As set out above, subclause 4020(1) requires there is no evidence before the Minister that the applicant has provided or caused to be provided a bogus document or information that is false or misleading in a material particular in relation to:
 - the application for *the visa* (being this visa); or
 - a visa that the applicant held in the period of 12 months before the application was made.
17. The applicant has not had PIC 4020 applied to him in relation to this visa application and has not had PIC 4020 in relation to a visa he already had when he made this application on 3 August 2012.
18. In this circumstance PIC 4020(1) does *not* therefore apply in relation to this Partner visa application.
19. PIC 4020(2) requires the Minister to be satisfied that the applicant and each member of the family unit have not, in the prescribed period commencing three years before the making of *this* visa application and ending when a decision on *this* application is made (being a decision by the Tribunal), been refused a visa on the grounds of:
 - Providing a bogus document or false or misleading information in relation to an application for that visa, or
 - Providing a bogus document or false or misleading information in relation to a visa that the applicant or family member held in the 12 months before making that application.
20. Department records indicate that on 13 April 2012 the applicant's application for a Skilled (Provisional)(Class VC) subclass 485 visa was refused on the grounds that he failed to meet PIC 4020(1).

21. The applicant at hearing and in submissions by his migration agent have been at pains to highlight that the visa applicant had never been responsible for the provision of misleading information and that it was the previous migration agent, Mahimn Sodani who had, unbeknown to the applicant, provided the misleading information to the Department. The nature of the misleading information was a claimed "incorrect" TRA reference number.
22. As explained to the applicant at hearing, it was a matter of fact that the applicant had been refused a visa in the period commencing three years before the making of the application for a Partner visa which occurred on 3 August 2012. At hearing the migration agent argued that the three years had now expired and that the PIC 4020 was on longer relevant at the time of decision (being the Tribunal's decision).
23. Having taken into account the agent's argument, the Tribunal is not convinced that this interpretation can be applied to the applicant's case. The agent may have considered that the PIC 4020(2) refers to the three years' prior to the making of the application for the Skilled Visa had expired (that visa was lodged on 12 March 2011). The Tribunal does not accept this to be the case, however, as it is clear that the prescribed three year period needs to be applied to *this* Partner visa application. Hence, during the three year period ending on 3 August 2012 when this application was lodged (and running from 3 August 2009) the applicant had been refused a Skilled visa on the basis of false information having been provided or caused to be provided to the Minister.
24. PIC 4020(2) therefore applies.

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

25. It is not for the Tribunal to go behind the fact that such a visa was refused. It has occurred and therefore PIC 4020(2) applies. As PIC 4020(1) or 4020(2) is not satisfied, PIC 4020 will nonetheless be satisfied if the Minister is satisfied:
 - compelling circumstances that affect the interests of Australia; or
 - compassionate or compelling circumstances that affects the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen
26. justify the grant of the visa and the PIC 4020 waiver should be applied.
27. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
28. In a submission to the Tribunal dated 3 September 2015, the migration agent has argued that when the subclass 820/801 visa was lodged, PIC 4020 was not applicable to the Partner visa caseload and that it was *"only due to the slow processing times of the department, that led to the review applicant being affected by PIC 4020, as it was retrospectively applied to 820/801 applications from 1 July 2013, almost 12 months after his subclass 820/801 application was initially lodged"*. While the retrospective application of PIC 4020 disadvantaged the applicant, the Tribunal does not consider that such circumstances affect the interests of Australia or constituted compassionate or compelling circumstances that affect the interests of an Australian citizen. It was always intended that PIC 4020 should operate retrospectively to ensure that persons who had provided bogus documents or false or misleading information more widely would come within the provisions.
29. The agent's submission does make salient points, however, which together with the evidence submitted at hearing, have persuaded the Tribunal that there are compassionate or compelling circumstances that affect the sponsor, an Australian citizen, and that the PIC 4020 waiver should be applied.

30. The applicant first arrived in Australia on 28 July 2008 on a subclass 572 Student visa which ceased on 15 March 2011. On 12 March 2011 he lodged his subclass 485 Skilled visa which was refused on 13 April 2012 due to the provision of false or misleading information. The Tribunal notes that the visa applicant has now been in Australia for seven years and that he has not been unlawful for any period. The applicant, is not, however, an Australian citizen and therefore any inconvenience or hardship that may affect him directly is not something the Tribunal can take into account in terms of the inquiry before it.
31. Nonetheless, the Tribunal considers that there are factors that do affect the sponsor directly, because of the visa applicant's compassionate and compelling circumstances.
32. The parties have been open about having entered into an arranged marriage. The parties were engaged on 21 December 2011 at the home of the sponsor in Sydney and the marriage was solemnised on 16 January 2012. The Tribunal does not have any information before it to conclude that the relationship was entered into other than for the purposes of developing a genuine and continuing spousal relationship, although the Tribunal appreciates that this is a matter that the Department will have to assess in much more detail than the Tribunal has done in this case.
33. The parties have given evidence that they held a large traditional Nepalese wedding and that before the community they are seen as husband and wife. The Tribunal considers that the traditional concept of marriage held by the parties should be taken into account in considering the application of PIC 4020 and the significant hardship that would befall the sponsor if it were not.
34. The sponsor's family live in Sydney and she could be required to wait for three years to be able to continue their relationship if the exclusion period applies, despite what appears to be a robust relationship. If the sponsor remains in Melbourne on her own she will find it difficult to manage her life as she only came to live in Melbourne because of the sponsor. If she returns to live in Sydney with her family as a married woman without her husband, this would also be considered highly irregular.
35. The parties have been in a married relationship since January 2012, well over three years and it can be argued that the longer the relationship has had time to cement, the greater the upheaval and nature of the significant hardship the Australian citizen, in particular, would be subjected to.
36. The parties have advised that they wish to start a family – a matter that is also relevant to their traditional background and views about marriage and family. A three year separation would see such plans significantly delayed and some community opprobrium about why, after all these years, they are yet to settle as husband and wife. The parties have stated that they have delayed having a child due to the visa applicant's status in Australia. The sponsor is now 28 years of age and while a three year separation may not, all things being equal, necessarily present any maternity issues, the Tribunal considers that continued separation would be a significant stressor in terms of their joint plan to have a family.
37. It has also been argued that the visa applicant's home of Gulmi was also heavily affected by the April 2015/May 2015 earthquakes and aftershocks. Gulmi is in the area/province of Lumbini and the applicant has submitted a map which shows that in Lumbini, the effects, depending on the locale, were either "strong" or "very strong". If the applicant had to return to Nepal he would be facing a situation where, while rebuilding of destroyed villages has commenced, there are many displaced persons, inadequate sanitary facilities, and lack of security [see: 'Returning to a Rebuilding Nepal', Kevin Bubriski, 10 August 2015, The New York Times, http://lens.blogs.nytimes.com/2015/08/10returning-to-a-rebuilding-nepal/?_r=0]

38. Given the possibility of a three year exclusion period the visa applicant is arguing that his sponsor would need to return to live with him in Nepal for an extended period but they would have nowhere to stay and he would need to accommodate the sponsor in very difficult circumstances. Furthermore, the visa applicant would find it very difficult to obtain employment. Even if the sponsor could stay in Nepal, however, the sponsor could not do so for an extended period because now that she is an Australian citizen she has had her Nepalese citizenship automatically revoked. The Tourism Act is limited in its powers to grant visas to enable the parties to be together in Nepal for any period beyond 90 days, and evidence has been submitted to show that this is the case.
39. In addition, the sponsor is highly dependent on the income of the visa applicant who earns \$55,000 per annum by holding down two jobs to support the sponsor. She is working 3 days a week but is not in a position to work full-time.
40. While not a significant factor in the overall consideration of this case the Tribunal notes that the migration agent has found a Departmental note on file that indicates that an officer had considered that based on the information provided, the PIC 4020 requirement ought to be waived in this case. The reason why this then did not go on to occur is not clear, except that perhaps the ultimate decision maker did not take this recommendation into consideration. The Tribunal is satisfied that the fact that a Departmental officer at some stage had considered that the PIC 4020 ought to be waived, reflects that this decision is the preferable decision overall.
41. Therefore the requirements of cl.4020(2) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

42. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal is not aware that there has been any concern raised at primary decision in relation to the identity of the applicant. Therefore, the applicant meets cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

43. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA). The Tribunal is satisfied that the applicant or a family unit has not been refused a visa on the basis of identity issues. Therefore cl.4020(2B) does not apply.
44. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.820.226.

DECISION

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 (Spouse) visa:
- Public Interest Criterion 4020 for the purposes of cl.820.226 of Schedule 2 to the Regulations.

Rosa Gagliardi
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...